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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 568

WILLIAM J. BATTEN and KATIE M. BATTEN, His Wife; DONALD G. BECKER and OPAL M. BECKER, His Wife; DON T. CAMPBELL and LETA MAE CAMPBELL, His Wife; ERNEST S. HORTON and MARGARET U. A. HORTON, His Wife; IVAN F. HUHS and BERNADINE M. HUHS, His Wife; THOMAS N. LEE and GLADYS M. LEE, His Wife; CLYDE A. LEWIS and DOROTHY L. LEWIS, His Wife; EDWARD DALE MOORE and FAY L. MOORE, His Wife; JOHN W. STEVENS and VADA STEPHENS, His Wife; and RALPH C. WEED and MARY T. WEED, His Wife, *Petitioners,*

vs.

THE UNITED STATES OF AMERICA, *Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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vs.

THE UNITED STATES OF AMERICA, *Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above case on July 10, 1962.

OPINIONS BELOW

The original opinion of the District Court for the District of Kansas filed February 16, 1961, is unreported and is set out in the appendix hereto, *infra*, p. 13. The opinion of the United States Court of Appeals for the Tenth Circuit, filed June 20, 1961, remanding the case to the District Court, is reported at 292 F.2d 144, and is set out in the appendix hereto, *infra*, p. 19. The opinion of the District Court for the District of Kansas, filed October 23, 1961, is unreported but is set out in the appendix hereto, *infra*, p. 21. The opinion of the United States Court of Appeals for the Tenth Circuit, filed July 10, 1962, is reported at 306 F.2d 580, and is set out in the appendix hereto, *infra*, p. 27. The Court of Appeals for the Tenth Circuit rendered no opinion on petition for rehearing.

JURISDICTION

The judgment of the District Court for the District of Kansas was made and entered on October 25, 1961, and a copy thereof is appended to this petition in the appendix, *infra*, p. 38. The judgment of the Court of Appeals for the Tenth Circuit was made and entered on July 10, 1962, and a copy thereof is appended to this petition in the appendix, *infra*, p. 38. The order of the Court of Appeals for the Tenth Circuit denying petitioners' petition for rehearing was made and entered on August 9, 1962, and a copy thereof is appended to this petition in the appendix, *infra*, p. 38. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

The United States of America acquired land immediately adjacent to residential property owned by petitioners herein,

on which it built ramps and runways for use by B-47 jet aircraft. In a suit brought by petitioners under the Tucker Act, the District Court found that the operation and maintenance activities carried on by the United States on this land constituted a substantial interference with the exercise of petitioners' property rights, and that the effect of the sound waves and smoke created by such operations was much greater upon petitioners' properties than upon other properties in the vicinity. The court further found that as a direct result of this interference, petitioners' properties have been diminished in value by 40 to 55 percent, but that the actions of the United States did not amount to a taking of property within the meaning of the Fifth Amendment to the United States Constitution, and hence petitioners' damages were not compensable. The Court of Appeals affirmed. The question presented is:

Whether the action of the United States in directing against and across private residential property, loud and continuous noises and strong vibrations, accompanied by smoke, soot and unpleasant odors, so as to place upon such private properties a direct, permanent and substantial burden not substantially shared by the general public, constitutes a taking of property within the meaning of the Fifth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the United States Constitution, Amendment V, set out in full in the appendix hereto, *infra*, p. 12, and further involves 28 USC, Section 1346. (a) (2), commonly known as the "Tucker Act," set out in full in the appendix hereto, *infra*, p. 12.

STATEMENT

On July 8, 1959, petitioners filed an action in the United States District Court for the District of Kansas, seeking recovery from the United States for the taking of their property, by virtue of establishment of a military jet air base on land immediately adjacent to petitioners' residential property. The action was brought under the Fifth Amendment to the United States Constitution and Title 28, U.S.C., Section 1346 (a) (2), otherwise known as the "Tucker Act." In the answer filed by the United States, its first defense was that the complaint failed to state a cause of action for which relief may be granted. The court reserved its ruling on this defense until after the trial of the action. Trial to the court was had, and on the 15th day of February, 1961, the District Court entered its order dismissing the complaint for failure to state a cause of action. From this order, petitioners appealed to the United States Court of Appeals, Tenth Circuit, and the judgment was vacated and the case remanded to the trial court for entry of judgment, based upon the record facts. That appeal was docketed as Case No. 6684 in the Court of Appeals.

Thereafter, the District Court entered its findings of fact and opinion based upon the record on October 23, 1961 (appendix *infra*, p. 21), and entered judgment in favor of the United States of America on October 25, 1961 (appendix, *infra*, p. 38). The facts as found by the trial court may be summarized as follows:

The petitioners are owners of homes in a small, two-street suburban subdivision known as Pauline, Kansas, located approximately six miles south of Topeka, Kansas. After petitioners had acquired their homes, the United States acquired property immediately adjacent for use in connection with the expansion and re-activation of Forbes Air Force Base, a

former temporary World War II Army airfield, which is now a permanent Air Force installation (Appendix, *infra*, p. 21).

The court found that immediately adjacent to the east of Pauline, Kansas Subdivision, the United States constructed a ramp area, warmup pad and the north end of a new Northwest-Southeast runway, all of which are used at all hours of the day and night and on all days of the week in the operation of RB-47 and B-47 jet aircraft, the new runway being put in operation in September, 1955, and the warmup pad and ramp area being put into operation in March or April of 1956. The court further found that there are and have been since September, 1955, a total of approximately one hundred (100) RB-47 and B-47 six-engine jet aircraft and approximately forty (40) KC-97 propeller-driven aircraft assigned to Forbes Air Force Base, which aircraft performed on the average approximately four thousand (4,000) aircraft movements per month since September, 1955. The court further found that the said jet aircraft use the new runway, designated as 13-31, almost exclusively with forty-five percent (45%) of the jet aircraft taking off in a southeasterly direction and fifty-five percent (55%) of the jet aircraft taking off in a northwesterly direction. The court further found that maintenance activities involving the running of jet engines were conducted on the new ramp, starting in March or April of 1956 (Appendix, *infra*, pp. 21-23.)

The court further found that during the operation of RB-47 and B-47 aircraft on the ramp, warmup pad and runway, loud noises and strong vibrations were heard and felt upon petitioners' property as a result of the sound, and shock waves directed against petitioners' properties have caused the windows and dishes to rattle, frequently interrupting conversations to the extent that at times it was difficult to carry on a conversation and impossible to talk on the telephone or listen to the radio or television, and quite frequently interrupted petitioners' sleep during the night. The court further found

that during the summer months when the jet engines use a water-alcohol injection system and when the wind blows toward petitioners' properties from the east, black smoke blows across petitioners' properties, leaving an oily, black deposit on the houses, windows and window screens, and the laundry of petitioners when it is hanging out of doors. The court further found that this black smoke emitted from the jet engines has an unpleasant odor, not unlike the odor given off by a kerosene stove in a closed room. The court found that on a few occasions, the aircraft did fly over petitioners' homes at low altitudes. The court found that as a result of the activities of the RB-47 and B-47 jet aircraft on and in the immediate vicinity of Forbes Air Force Base, and particularly on the new ramp and runway, that petitioners suffered a substantial interference of the use and enjoyment of petitioners' properties which did not exist prior to the institution of these activities, and which depreciated the value of petitioners' homes by 40 to 55 percent (Appendix, *infra*, pp. 24-26).

After finding the above facts, the court concluded as a matter of law that the petitioners were not entitled to recovery (Appendix, *infra*, p. 26).

The Court of Appeals entered its order affirming the judgment of the District Court on July 10, 1962 (Appendix, *infra*, p. 38). Petitioners filed their petition for rehearing before the Court of Appeals on July 30, 1962, and the Court of Appeals entered its order denying the petition for rehearing on August 9, 1962 (Appendix, *infra*, p. 38).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals should be reviewed for the reason that the question presented is one of great public significance. It is a question passed upon long ago by this court with relation to similar circumstances arising from

the operation of railroads, but which is now presented for the first time with reference to the age of aircraft and the complex developments which the future holds. By its decision herein, the Court of Appeals for the Tenth Circuit has reached a conclusion directly opposed to the principles established by this court in the early railroad cases, and has established a precedent which places in the hands of the Federal Government the power to make a mere sham of the protection afforded the private citizen by the just compensation clause of the Fifth Amendment.

1. There is, perhaps, no emergent problem of the jet age which has come into as much discussion in the periodical literature as the very problem now squarely presented to this court. The problem arises from the universally recognized plight of the unfortunate individuals who have been caught in the fringe areas immediately surrounding new jet airfields. For these individuals, the impact of the noise and other by-products of jet operations has been nothing short of traumatic. Attempts at solution have been made: noise suppressors have been installed upon aircraft; sound barriers have been erected; airfields have even been closed to jet traffic. The ultimate satisfactory solution seems not yet to have been found. Yet underlying the technological developments rapidly occurring in this new era, there lies a most basic problem in human rights, as Americans understand these rights. The courts alone can decide whether, in the name of benefit to the many, the Federal Government may cast these new burdens upon the shoulders of the very few without payment of just compensation. This case, for the first time, directly presents that question, and the lower courts have held that the Federal Government has that power, and thus the power to make a mockery of a private individual's rights to call his dwelling place a home. It is respectfully submitted that this question should not be laid to rest until this court has heard the arguments on a matter of such vital import.

2. The decision of the Court of Appeals clearly abrogates the principles laid down by this court many years ago in *Baltimore and Potomac Railroad Company v. Fifth Baptist Church* (1883), 108 US 317, 2 S.Ct. 719, 27 L.ed 739, and *Richards v. Washington Terminal Company* (1914), 233 US 546, 34 S.Ct. 654, 58 L.ed 1088. These were cases on all fours with the present case, except that those cases involved railroad operations while the present case involves operation of aircraft. The *Baptist Church* case was an action grounded on nuisance for noise, vibrations, smoke and soot caused by the location of defendant's engine house adjacent to plaintiff's church in Washington, D.C. Defendant claimed immunity based on its Congressional grant of authority to operate the railroad company, which contemplated establishment of a engine house. The court, through Mr. Justice Field, held that such immunity applied to cases where incidental damages from ordinary and reasonable operations must be borne by those affected for the public accommodation. It was held that the use here was unreasonable, and the court admitted to doubt whether Congress could authorize such a substantial burden on private property without allowing such owners the right to compensation for the injuries so occurring.

The *Richards* case, decided thirty years later, demonstrated the unwavering adherence of this court to the same principle. This was an action for damages to property resulting from the maintenance of a railroad operation by the defendant company. The defendant's railroad ran into a tunnel near the plaintiff's neighboring, though not adjacent, property. An exhaust fan was constructed to drive the smoke and fumes out of the tunnel and directed them in such a manner that they came on and across plaintiff's property. The case arose in the city of Washington, where the defendant operated under a Congressional grant of authority, and was founded by the plaintiff on nuisance. The Supreme Court there held that

while a legislature may legalize what otherwise would be a public nuisance, *it may not confer immunity from action for a private nuisance of such a character as to amount in fact to a taking of private property for public use.*

Recognizing this distinction between public and private nuisance and, following *Baltimore and Potomac Railroad Company v. Fifth Baptist Church* (1883), 108 U.S. 317, 2 S.Ct. 719, 27 L. Ed. 739, the court held that no authority conferred by Congress would justify an invasion of private property to the extent that private rights were impaired without compensation. The court further held that no such grant of authority affected the claim of a private citizen for damages for any *special inconvenience and discomfort not experienced by the public at large.*

This, then, is the very heart and importance of the *Richards* case. The court has squarely held that, while no compensation will be granted for smoke, noise, fumes and vibrations when they are suffered merely as a shared burden with the general public, compensation for injury caused by these very same agents must be granted where they cast an unusual burden upon private property which is not shared by the general public.

In the case now before the court, the Trial Court found that petitioners were subjected to many hours of exposure to sound pressure levels *even in excess of those levels at which the Air Force requires its personnel to wear ear plugs* (Appendix, *infra*, pp. 24-25); that black smoke is blown across petitioners' properties leaving oily black soot on their houses, windows and laundry (Appendix, *infra*, p. 25); that the smoke carries with it unpleasant odors (Appendix, *infra*, p. 25); that the petitioners thereby have suffered a *substantial interference* with the use and enjoyment of their properties (Appendix, *infra*, p. 25), the effect of which is *much greater* than on other property in the general area surrounding the base (Appendix, *infra*, p. 25).

Clearly, as pointed out in the dissent of Chief Judge Murrah in the court below; the facts and reasoning of the *Baptist Church* and *Richards* cases are analogous to this case. In each case, the injured party suffers a burden cast upon him by the concentration of an activity on adjoining land which made the effect of the smoke, fumes, soot and noise weigh much heavier upon him than upon the general public. In these circumstances, it is clear that the burden is not shared, but is unequally shifted upon the shoulders of the few. Yet in the case at hand, the Court of Appeals denies compensation, a result wholly inconsistent with the dictates of this court in *Baptist Church* and *Richards*.

This court has never given any indication of any intent to vary from the principles applied in *Baptist Church* and *Richards*. As recently as 1960, the principle was reaffirmed when the court said in *Armstrong v. United States* (1960), 364 U.S. 40, 80 S. Ct. 1563, 4 L. Ed. 2d 1554, at p. 49 of the official report:

> "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

In view of the abrogation of this principle by the Court of Appeals, and the direct conflict of its decision with the prior decisions of this court, it is submitted that review of this case should now be had.

3. The final, and perhaps even the most pressing, reason why this court should review the decision of the Court of Appeals herein is because of the vast power which this decision places in the hands of the Federal Government. The Trial Court has found that as a direct result of the government activities complained of, petitioners' properties have been

diminished in value by 40.8 to 55.3 percent. If the decision of the Court of Appeals stands, the Federal Government is now free, if it desires, to condemn petitioners' properties *at this diminished value*, and thus reap the benefit of the damage caused by its own activity. It is then able to move its runways and operations onto the land so acquired, and, by the same process, diminish the value of the next property and then acquire it at a diminished price. This process can go on *ad infinitum*.

Indeed this same process may now be used for the acquisition of any land needed by the Federal Government, given only a point from which to start.

While it is not in any sense the intent of petitioners to ascribe to the Federal Government any malicious intent or design to carry out such a purpose, the point is raised to indicate the tremendous implications of the decision of the Court of Appeals. Surely a decision which opens the gates to such power — a power which virtually makes a sham of the Fifth Amendment right of individuals to just compensation — merits review and consideration by this court before it becomes the law of the land.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

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APPENDIX

Constitutional Provisions and Statutes Involved:

United States Constitution, Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

28 U.S.C. Section 1346 (a)(2)

"S. 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * * * * * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

* * * * * * * *"

Opinions of Lower Courts

Initial opinion of the District Court for the District of Kansas:

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND OPINION.

"Plaintiffs instituted this action as a class suit against the United States seeking recovery for compensation for a taking of a part of plaintiffs' property by the United States. The Government filed its answer in which it asked that the complaint be dismissed for failure to state a cause of action upon which recovery could be had. After the filing of the answer, plaintiffs filed a motion asking that the legal question raised by the answer be determined prior to trial. After a hearing, the court overruled the motion and deferred the determination of the legal question to a later date.

Thereafter, the cause was regularly set for trial and came on for hearing before the undersigned on December 19, 1960, plaintiffs being present in person and by their counsel of record, and the United States, the defendant, being present by George Thomas VanBebber and Jerry W. Hannah, Assistant United States Attorneys. The case being called for trial, the Government renewed its motion to dismiss, but since all the parties and the witnesses were present in court, the court reserved its ruling thereon and proceeded with the trial of the case. At the conclusion of the plaintiffs' case, the Government again renewed its motion to dismiss and also moved for a directed verdict. Judgment on these motions was reserved. At the conclusion of the entire case, the court took the case under advisement and announced that it would first consider and determine the legal question presented by the motion to dismiss and for a directed verdict, and asked both parties to submit briefs. The court has considered the briefs submitted and for the reasons hereinafter stated, concludes that the motion to dismiss should be sustained.

Findings of Fact.

1. Forbes Air Force Base, first known as Topeka Army Air Field, was a temporary World War II base, which was used

for training activities of propeller type aircraft. It was deactivated after World War II. As originally laid out, the Base was considerably smaller than it now is. It is sufficient to say that as originally established, the north boundary of the field abutted on a road running east and west, and known as the Berryton Road.

2. In 1948, and prior to the enlargement of the Base, Clyde Smalley was the owner of a tract of land lying immediately west of a line extending the western boundary of the Base in a northerly direction and immediately north of the Berryton Road extended in a westerly direction. At this time, Smalley platted this land and laid it out into lots and blocks as a suburban residential addition. The addition was known as Pauline, Kansas.

3. Most of the houses owned by the plaintiffs in Pauline, Kansas, were built during 1949 and 1950, and none were built after September, 1955. After the Korean War began, the Government acquired the tract immediately north of the Berryton Road and adjoining the Pauline addition on its eastern boundary. This acquisition was for the purpose of enlarging Forbes Air Base.

4. The additional ground was acquired for the purpose of constructing longer runways. Situated on this tract were two long runways, runways 13 and 31. These runways were constructed for the purpose of accommodating jet airplanes which had not been installed at Forbes Air Base before this time. There were also constructed on this new acquisition a ramp and a parking area and a warm-up pad area for the use of jet planes. These facilities were put into use by the United States in March or April of 1956, at a time when all the plaintiffs owned their property involved in this suit.

5. Since September, 1955, there have been assigned to Forbes Air Base two RB47 or B47 wings, each wing having assigned to it an average of 50 RB47 or B47 jet aircraft. It is the use of this additional strip of ground for the operation of these jet planes immediately opposite plaintiffs' property which gives rise to plaintiffs' claim for compensation.

6. The Government's motion admits all facts of the complaint well pleaded, and for the purpose of these findings, the court adopts the facts as set out in the petition most favorable to plaintiffs' claim.

7. Based upon the complaint, the court finds these facts. That the plaintiffs were, at all times pertinent, the owners of described tracts of ground in Pauline, Kansas, a subdivision, as set forth in the complaint; that during the summer of 1955, at a time when the plaintiffs were owners of the described real estate, the United States of America constructed an air force base on land immediately adjacent to the east of the Pauline, Kansas, subdivision, a ramp area and a warm-up pad which are used in the operation of multi-jet aircraft, commonly referred to as RB47 aircraft; that the warm-up area and pad area were put into use in the month of September, 1955; that the said ramp area and warm-up pad are adjacent to and connected with the north end of the west side of the northwest-southeast runway of said air force base; that the RB47 aircraft use said ramp area for the purpose of warming up the jet engines of said aircraft prior to take off; that after an engine has been warmed up, the aircraft is then moved to the warm-up pad area where each engine is advanced to maximum power output; that the advancing of said engines, as aforesaid, is necessary to the operation of the aircraft and is done without exception every time an aircraft is flown.

8. The court finds that the aircraft, while landing and taking off from the runway and while warming up the engines and particularly while advancing the engines to near maximum power output on the warm-up pad area, cause to be heard and felt terrific and overwhelming vibrations and sound waves which are directed and transmitted from said engines over, across, against and upon the property owned by the plaintiffs herein; that all of the above activities are carried on at all hours of the day and night and at all times during the week.

9. That the aforesaid vibrations have caused the windows of the houses owned by the plaintiffs to rattle, and in some instances break, have caused the dishes, glassware and cooking

utensils in the cupboards to rattle and in some instances to crack, and have caused the walls and wallpaper to become cracked.

10. That these sound waves, as set out, have been so great as to prevent conversations in normal tones to be carried on whether inside or outside of the houses of the plaintiffs, have prevented plaintiffs, their families and their guests from being able to carry on conversations or listen to radio or television programs and have deprived plaintiffs, their families and guests from their sleep on innumerable occasions, both during the daytime and at night.

11. That these vibrations and sound waves have caused the plaintiffs, their families and others who would occupy their property, to become nervous and ill, although the plaintiffs and their families are in normal circumstances well and healthy persons.

12. Plaintiffs' contentions are that these activities have created a servitude upon the property of the plaintiffs and that defendant, by these activities, has appropriated the property of the plaintiffs to its use, thereby depriving the plaintiffs of the use and enjoyment of their property, and that this amounts to a taking without payment of just compensation.

Conclusions of Law

The court concludes, as a matter of law, that the above activities do not, under the decisions, amount to a taking of any part of plaintiffs' property by the Government, and that, therefore, the complaint fails to state a cause of action and plaintiffs are not entitled to recover.

Opinion

The cases which have considered damage claims arising from the operation of military planes adjacent to residential property or flying over such property are not numerous and even more limited are the cases which have considered the activities of jet propelled aircraft. In cases of this kind, the lower courts seem to have consistently denied any recovery on

the theory of a taking for diminution in property value due to noises or vibrations resulting from the operation of jet planes adjacent to private property and where no fly over is involved.[1]

Such cases as Baltimore and Potomac Railroad Company v. Fifth Baptist Church, 108 U.S. 317; Richards v. Washington Terminal, 233 United States, 546; and Swetland v. Curtiss Airports Corp., 55 F. 2d, 201, upon which plaintiffs rely, would seem clearly distinguishable upon the facts. The Fifth Baptist Church case was a suit to abate a nuisance maintained by the Railroad Company in the manner in which it operated its railroad station and yards. While the Richard's case allowed some recovery, the court clearly held that damages from vibrations, noises, etc., caused by the operation of the railroad were not recoverable because there had been no entry upon the premises which was necessary to constitute a taking. The Swetland case was a suit to enjoin the operation of an airport established by a private corporation on the ground that it constituted a nuisance. Furthermore, the weight to be accorded to this case is doubtful in light of the case of U.S. v. Causby, 328 U.S. 256, hereinafter discussed.

United States v. Causby, 328 U.S. 256, is denominated by the Supreme Court as a case of first impression. In this case a path of glide of airplanes to the runways of the airport used by the Government regularly passed over Causby's property at a low altitude, destroying the use to which his property was being put. The court held that this intrusion into the air space over his property, which of right belonged to him, constituted a taking measurably akin to an easement for which compensation was due under the Tucker Act. It distinguished the case from the Richard's case, supra, 233 U.S. 546, in which, on somewhat analogous facts, relief was denied on the ground that there was no entry upon Richard's property and that the noises and vibrations which caused damage to his property did not constitute a taking. The rationale of the Causby case would seem to be that to constitute a taking there must be some form of entry upon a claimant's property and that using the air space over one's property, which of right belongs to

[1] Pope v. U.S., 173 F. Supp. 36; Nunnally v. U.S., 239 F. 2d, 521.

him, for the purpose of gliding to a safe landing on the runway constituted an entry.

The operations by the Railroad in the Richard's case created a nuisance. The Supreme Court in the Causby case speaks of them as "a legalized nuisance." There is no doubt in the court's mind but that the operations of the jet planes at Forbes Air Base constitute a grave nuisance to plaintiffs which result in a substantial diminution to the value of their property but such operations constitute a legalized nuisance — one which the Government is authorized to maintain and for which recovery may not be had under the Tucker Act.

Judgment, in conformity with these views, dismissing plaintiffs' petition and the cause of action, will be entered.

Dated at Topeka, Kansas, this 15th day of February, 1961.

WALTER A. HUXMAN
Judge, Assigned.

Filed Feb. 16, 1961."

Initial opinion of the Court of Appeals, Tenth Circuit:

PER CURIAM

"The appellants in this appeal are owners of residential property adjacent to the ramps and warm-up pads where military jet aircraft regularly warm up, take off and land, at Forbes Airforce Base near Topeka, Kansas. They brought this class action under the Tucker Act (28 USC Sec. 1346 (a) (2)), claiming that the aircraft, while landing, taking off and warming up, and particularly while advancing the engines to near maximum power on the said warm-up pad area, cause to be heard and felt terrific and overwhelming vibrations and sound waves, directed and transmitted from the said engines over, across, against and upon the properties owned by plaintiffs; that there is also emitted from the said engines exhaust fumes and heavy black smoke which are directed and transmitted over, across, against and upon the properties * * * at all hours of the day and night, and at all times during the week" to the permanent injury and damage to their property. It was alleged that the United States had thus created a servitude upon the property of the plaintiffs amounting to a constitutional taking for which just compensation is due.

The trial court reserved ruling on the Government's motion to dismiss for failure to state a claim, and also the motion to dismiss and for a directed verdict at the conclusion of the plaintiffs' case. At the conclusion of the entire case, the court announced that it would first consider and determine the legal question presented by the motions to dismiss and for a directed verdict. The court finally concluded to sustain the motion to dismiss for failure to state a claim. It then proceeded to find and adopt the facts as set forth in the claim, and concluded that operation of the jet planes at the Airbase "constitute a grave nuisance to the plaintiffs which result in a substantial diminution in the value of their property, but such operations constitute a legalized nuisance – one which the government is authorized to maintain and for which recovery may not be had under the Tucker Act." Judgment was entered accordingly.

The property owners have appealed, contending that their injuries come within the rationale of United States v. Causby, 328 U.S. 256. Ordinarily, we should be readily disposed to decide the legal question on the stated facts. But the United States, while having moved for judgment on the stated claim, and the plaintiffs' case, now, apparently for the first time, argues for a remand of the case for the purpose of securing findings of fact and conclusions of law based upon the record facts. The argument is to the effect that new and far reaching constitutional questions like this should not be made to turn upon what is merely claimed, but rather what is proven, as a basis for the judgment of the court.

We agree that the case does present a vastly important question whether the acts complained of amount to a constitutional taking within the meaning of the Fifth Amendment. And, we also agree that the question ought to be resolved on the established facts. In these circumstances, the court is disinclined to make disposition of the case on the bare averments of the complaint.

The judgment is accordingly vacated and the case is remanded to the trial court for entry of a judgment based upon the record facts."

Opinion of the District Court for the District of Kansas on remand:

Findings of Fact.

"Pursuant to the mandate of the Circuit Court of Appeals in the above entitled cause, the court makes the following findings of fact based upon the record.

1. This action was instituted as a class action by plaintiffs against the United States. The gist of the action is that the activities of the United States, hereinafter set out, have created a servitude upon plaintiffs' property amounting to a constitutional taking for which compensation is due and unpaid. The court has jurisdiction of the parties and of the subject matter. Jurisdiction is predicated on 28 U.S.C.A., Sec. 1346 (a) (2) — The Tucker Act.

2. Forbes Air Force Base, first known as Topeka Army Air Field, was a temporary World War II base, which was used for training activities of propeller type aircraft. It was deactivated after World War II. As originally laid out, the Base was considerably smaller than it now is. It is sufficient to say that as originally established, the north boundary of the field abutted on a road running east and west, and known as the Berryton Road.

3. In 1948, and prior to the enlargement of the Base, Clyde Smalley was the owner of a tract of land lying immediately west of a line extending the western boundary of the Base in a northerly direction and immediately north of the Berryton Road extended in a westerly direction. At this time, Smalley platted this land and laid it out into lots and blocks as a suburban residential addition. The addition was known as Pauline, Kansas. Most of the houses owned by the plaintiffs in Pauline, Kansas, were built during 1949 and 1950, and none were built after September, 1955.

4. After the Korean War began, the Government acquired the tract immediately north of the Berryton Road and adjoining the Pauline addition on its eastern boundary. This acquisition was for the purpose of enlarging Forbes Air Force Base to accommodate jet airplanes. The additional ground was

acquired for the purpose of constructing a new and longer runway. A new runway designated as 13 and 31 was constructed and put into operation in September, 1955, for the purpose of accommodating the RB-47 and B-47 jet aircraft which had not been stationed at Forbes Air Force Base prior to that time. There was also constructed on the land acquired by the United States a ramp and parking area and a warm-up pad area for the use of jet planes which were put into operation in March or April, 1956. The western edge of the ramp and parking area is approximately 650 feet from plaintiffs' closest homes on Lake Drive. The ramp itself is 900 feet wide.

5. (a) There are, and have been since September, 1955, a total of approximately 100 RB-47 and B-47 six-engine jet aircraft, and approximately 40 KC-97 six-engine propeller-driven aircraft, assigned to Forbes Air Force Base. These aircraft have performed on the average of approximately 4,000 "aircraft movements" per month since September, 1955. Approximately 70% of the said aircraft movements are attributed to the RB-47 or B-47 aircraft. An aircraft movement includes a take off, landing or low approach.

(b) Aircraft movements occur primarily between the hours of dawn and dusk, Mondays through Fridays, but also occur on some occasions on weekends and throughout the nights. The aircraft movements increase at night during the summer months. Aircraft movements at Forbes Air Force Base may occur, and have occurred, at any hour of the day or night on any day of the week.

(c) RB-47 and B-47 jet aircraft use the runway designated as 13-31 almost exclusively other than emergencies, and engine operating procedures by these aircraft are the same whether taking off on this runway in a northwesterly or a southeasterly direction. Approximately 45% of the jet aircraft take off in a southeasterly direction, and 55% take off in a northwesterly direction.

(d) RB-47 and B-47 jet aircraft engines are started on the parking ramp 30 minutes prior to take off time. Approximately 20 minutes prior to take off time, the aircraft is taxied to the warm-up pad, which is approximately 2000 feet from plaintiffs' nearest property, where final pre-flight checks are

performed. All during this period of time, the aircraft has all six engines operating at 40% which is idling speed. Three minutes before the take off, the aircraft is lined up on the end of the runway for take off and 30 seconds before take off, the power on all six engines is advanced to 100% RPM or maximum power output. The take off point is 2000 feet from plaintiffs' property at the closest point to plaintiffs' property. At take off time, the brakes are released and the aircraft begins its take off roll, leaving the ground, under normal conditions, about 50 seconds thereafter with engines still operating at maximum power output.

(e) From April through October, a water-alcohol injection system is used which increases the maximum power output by 23%. A trail of black smoke is characteristic of the engines of RB-47 and B-47 jet aircraft, and with the use of the water-alcohol injection system this black smoke is increased and is quite heavy for approximately 70 seconds after brakes have been released for take off, the smoke being exhausted within a mile from the end of the runway.

(f) The operation of the engines at maximum power output is not performed in the normal flight nor in the "traffic pattern" around Forbes Air Force Base. Jet engines are operating at maximum power output on that part of the new runway 13-31 situated closest to plaintiffs' properties in all take offs, without regard to whether the take off is in a northwesterly or a southeasterly direction.

(g) The Pauline Subdivision is outside the flying pattern of all aircraft operating from Forbes Air Force Base, and the Government does not claim or exercise any right to fly any planes over plaintiffs' property. However, on a few occasions, RB-47 and B-47 jet aircraft did fly directly over plaintiffs' homes in Pauline, Kansas, Subdivision at low altitudes.

6. (a) The normal work day for maintenance personnel at Forbes Air Force Base is from 7:15 A.M. to 5:15 P.M., but that maintenance activity is sometimes carried on at night. Maintenance activity at Forbes Air Force Base involving the running of jet engines may occur, and has occurred at any hour of the day or night on any day of the week.

(b) Maintenance activity involving the running of jet

engines at power setting of from 50% to 100%, is conducted on the new ramp which was put into operation in March or April of 1956, 3,420 feet from plaintiffs' property. Since May, 1960, this operation has been removed to a place approximately one and one-half miles from plaintiffs' property.

(c) During the month of March, 1960, which may be deemed a typical month for maintenance activity, there were 81 hours of B-47 and RB-47 jet engine running time in the 100% RPM range for maintenance purposes only. In addition, there were, during the same month, 211 hours and 20 minutes of B-47 and RB-47 jet engine running time in the below 100% RPM range for maintenance purposes only. These figures reflect only maintenance on the new ramp and were performed 3420 feet southeast of plaintiffs' nearest property.

(d) Auxiliary ground power units or generators are frequently and commonly operated on the aircraft parking ramp and are used to provide auxiliary power for the starting of RB-47 and B-47 jet aircraft, and for recharging the batteries thereon. Quite commonly, there are from four to ten of such generators running at one time and it is not unusual for these generators to be running from 8 to 10 hours at a time during the daytime and occasionally at night.

7. Loud noises and strong vibrations are heard and felt upon plaintiffs' properties as a result of the sound and shock waves directed against and across plaintiffs' properties from the jet engines in operation on the new ramp and runway and warm-up pad at Forbes Air Force Base. These vibrations, at times, cause windows to rattle and dishes to rattle in the cupboards, and limit the plaintiffs' use and enjoyment of their property in that conversations are frequently interrupted to the extent that it is, at times, difficult to carry on a conversation. It is, at times, impossible to talk on the telephone or listen to the radio or television. Plaintiffs' sleep is quite frequently interrupted by the operation of said jet aircraft at night.

8. That the sound pressure level on plaintiffs' properties as measured in decibels, as far as the 100% RPM range which is the maximum power output of said jet engines either on

take off or in maintenance activities ranges from 90 decibels to 117 decibels. Ear plugs for Air Force personnel are recommended when sound pressure level, as measured in decibels, reaches 85 decibels, and are mandatory when sound pressure level, as measured in decibels, reaches 95 decibels.

9. During the summer months, when the wind blows toward plaintiffs' properties from the east, black smoke will, on occasion, blow across plaintiffs' properties from jet aircraft taking off from the new runway. This black smoke leaves an oily black deposit on the houses, windows and window screens of plaintiffs' property, and upon the laundry of the plaintiffs when it is hanging out of doors. The black smoke has an unpleasant odor not unlike the odor given off by a kerosene stove in a closed room.

10. As a result of the activities of the RB-47 and B-47 jet aircraft on and in the immediate vicinity of Forbes Air Force Base, and particularly on the new ramp and runway, plaintiffs have suffered a substantial interference of the use and enjoyment of their properties, which interference did not exist prior to the construction and activation of the new runway in September, 1955, and the new ramp in March or April, 1956.

11. The sounds emitted from the jet aircraft operations at Forbes Air Force Base are heard generally throughout the area surrounding the Base in addition to plaintiffs' property, and includes as well other commercial and residential properties in Pauline and the general vicinity. The effect of the sound waves and the smoke produced by the jet operations, insofar as the Pauline Subdivision is concerned, is of the same character as that noticed in varying degrees in the general area surrounding the Base. The difference being that because of the proximity of plaintiffs' property to the operations, the effect of these things are much greater upon their property than on any other property farther removed from the Base or the operations.

12. The court finds that the value of plaintiffs' property, described in the complaint, before and after the institution of the jet operations, is as follows:

Don T. Campbell and Leta Mae Campbell:	Before – $15,250 After – 7,500
Ernest S. Horton and Margaret U. S. Horton:	Before – $12,000 After – 7,000
Ivan F. Huhs and Bernadine M. Huhs:	Before – $12,500 After – 6,500
John W. Stephens and Vada Stephens:	Before – $12,000 After – 6,500
William J. Batten and Katie M. Batten:	Before – $15,900 After – 7,100
Thomas N. Lee and Gladys M. Lee:	Before – $12,250 After – 7,000
Clyde A. Lewis and Dorothy L. Lewis:	Before – $11,500 After – 6,500
Ralph C. Weed and Mary T. Weed:	Before – $13,500 After – 6,500
Donald G. Becker and Opal M. Becker:	Before – $11,500 After – 6,500
Edward Dale Moore and Faye L. Moore:	Before – $11,500 After – 6,800

Conclusions of Law

The court concludes as a matter of law that, based upon the above findings, under the decision of the Supreme Court in United States v. Causby, 328 U.S. 256, plaintiffs are not entitled to recover.

Judgment will be entered for the Government for its costs.

/s/ WALTER A. HUXMAN
Judge Assigned.

Filed Oct. 23, 1961."

Final opinion of the Court of Appeals, Tenth Circuit:

"Before MURRAH, Chief Judge, and LEWIS and BREITENSTEIN, Circuit Judges.

BREITENSTEIN, *Circuit Judge.*

This case presents the novel question whether a taking of property, compensable under the Fifth Amendment, occurs when there is no physical invasion of the affected property but the operation and maintenance of military jet aircraft on an Air Force Base of the United States produce noise, vibration, and smoke which interfere with the use and enjoyment of the property. The appellants-plaintiffs, owners of 10 homes at Pauline, Kansas, sued the United States under the Tucker Act[1] and base their claims on the use of jet aircraft at Forbes Air Force Base which adjoins the subdivision in which they live. They acquired their homes prior to the enlargement of the Base to accommodate jets. Recovery was denied on the ground that there was no taking of property in violation of the Fifth Amendment for which the United States was liable under the Tucker Act.[2]

The facts are not disputed. Forbes Air Force Base, originally known as Topeka Army Air Field, was a temporary World War II base used for training in the operation of propeller-driven aircraft. It was deactivated at an undisclosed date prior to 1948. In that year a tract, the southeastern corner of which adjoined the northwestern corner of the Base, was platted as a residential subdivision. The homes of the plaintiffs were built and acquired in the period 1949-1955. After the Korean War started the United States obtained land adjacent to the subdivision on the east to enlarge the Base for the accommodation of jet aircraft. Use of a lengthened runway,

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[1] 28 U.S.C. Sec. 1346(a)(2). The United States District Court had jurisdiction because each claim was for less than $10,000.

[2] The Tucker Act provides, 28 U.S.C. Sec. 1346(a)(2) that an action may be maintained against the United States for a claim "founded • • • upon the Constitution, • • • or upon any express or implied contract with the United States." The last clause of the Fifth Amendment reads: "nor shall private property be taken for public use, without just compensation."

known as 13-31, began in September, 1955, and a ramp, parking area, and warm-up pad for jet planes were put into operation in the spring of 1956.

Since the enlargement of the Base, about 100 RB-47 and B-47 six-engine jet aircraft and about 40 KC-97 six-engine propeller-driven aircraft have been located there. Aircraft movements average about 4,000 monthly or about 130 daily and of these 70% are attributed to jets. This activity occurs usually between dawn and dusk, Monday through Friday, but occasionally on the week ends and at night.

The plaintiffs do not rely on flights over their properties to sustain their claims. The trial court found:

> 'The Pauline Subdivision is outside the flying pattern of all aircraft operating from Forbes Air Force Base, and the Government does not claim or exercise any right to fly any planes over plaintiffs' property. However, on a few occasions, RB-47 and B-47 jet aircraft did fly directly over the plaintiffs' homes in Pauline, Kansas, Subdivision at low altitudes.'

The jets use the 13-31 runway almost exclusively. The operating procedure is for the engines to be started on the parking ramp about 30 minutes before take-off. The ramp is 900 feet wide and at its nearest point is 650 feet from any property of the plaintiffs. After about 10 minutes the plane is taxied to the warm-up pad, located 2,000 feet from the nearest property of the plaintiffs, where final pre-flight checks are performed. During this period all 6 engines are running at idling speed. The plane is then moved to the take-off point. About one-half of the flights begin at the end of the 13-31 runway near Pauline and at a point 2,280 feet from the nearest property of the plaintiffs. About 30 seconds before take-off the engine power is advanced to maximum output. The planes are airborne some 50 seconds after start.

From April through October a water-alcohol injection system is used to increase the maximum power by 23%. The RB-47 and B-47 jets leave a characteristic trail of black smoke which is increased by the use of the water-alcohol injection system and which is quite heavy for about 70 seconds after

the brakes have been released for take-off but which is exhausted within a mile from the end of the runway.

Maintenance work on the planes was done on the ramp 3,420 feet from the nearest property of the plaintiffs until May, 1960, when it was moved to a location about 1½ miles therefrom. In the maintenance operations jet engines are run at power settings of from 50% to 100%. During a typical month the engines were operated for 84 hours in the 100% RPM range and for 211 hours in less than that range for maintenance purposes.

Ground power generators are used on the parking ramp to provide auxiliary power to start the jet engines and to recharge the batteries of the planes. From 4 to 10 of these generators may operate at the same time and on occasion they run from 8 to 10 hours at any time during the day and sometimes at night.

The mentioned activities produce sound and shock waves which cross the plaintiffs' properties and limit the use and enjoyment thereof. Strong vibrations cause windows and dishes to rattle. Loud noises frequently make conversation and the use of the telephone, radio, and television facilities impossible and also interrupt sleep. During engine operation in the 100% range the sound pressure level measured in decibels varies from 90 to 117 decibels on the plaintiffs' properties. Ear plugs are recommended for Air Force personnel when the sound pressure level reaches 85 decibels and are required at or above 95 decibels.

In the summer months when there is an easterly wind, the black smoke developed during jet take-offs occasionally blows across the plaintiffs' properties leaving an oily black deposit on the houses and laundry of the plaintiffs.

The court found that:

> * * * plaintiffs have suffered a substantial interference of the use and enjoyment of their properties, which interference did not exist prior to the construction and activation of the new runway in September, 1955, and the new ramp in March or April, 1956.'

The court further found that such interference 'is of the same character' as that noticed in varying degrees in the

general area surrounding the Base with greater adverse effect on the plaintiffs because of the proximity of their property to the Base.

Diminution in value of the 10 homes was found in amounts which varied from $1,700 to $8,800.[3] The trial court deemed United States v. Causby, 328 U.S. 256, to be a controlling precedent and held that there was no taking of an interest in the plaintiffs' properties for which compensation had to be paid.

The case at bar is one of first impression in the federal appellate courts and presents an issue of widespread current interest. The jet airplane is a great boon to the traveler but a veritable plague to the homeowners near an airfield. The noise, vibration, and smoke incidental to the operation and maintenance of jet planes disturb the peace and quiet in every residential area located near an airport used by the jets. This disturbance is felt not only by those whose property is crossed by the planes on take-offs or landing but also by those who live outside of the established flight patterns. The Supreme Court has allowed recovery under the Tucker Act to a landowner whose property was crossed by low elevation flights of military planes on take-offs and landings.[4] The novelty in the instant case is that liability is asserted not because of disturbance in conjunction with any over flights but because of the noise, vibration, and smoke alone which harass the occupants of nearby properties. The amount of harassment varies with the proximity of the property to the scene of jet operations.

No amount of sympathy for the vexed landowners can change the legal principles applicable to their claims. We do not have either a tort or a nuisance case. The plaintiffs sue under the Tucker Act and whether the applicability of that Act depends on a taking without compensation in violation of the Fifth Amendment or on an implied promise to pay for property taken, the claims are founded on the prohibition of

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[3] Stated in terms of percentages the diminution in value ranged from 55.3% to 40.8%.

[4] United States v. Causby, supra. See also Griggs v. Allegheny County, 369 U.S. 84.

the Fifth Amendment, 'nor shall private property be taken for public use without just compensation.'[5]

In construing and applying this constitutional provision the federal courts have long and consistently recognized the distinction between a taking and consequential damages. In Transportation Company v. Chicago, 99 U.S. 635, 642, the Supreme Court held that governmental activities which do not directly encroach on private property are not a taking within the meaning of the Fifth Amendment even though the consequences of such acts may impair the use of the property. The principle was repeated in United States v. Willow River Power Co., 324 U.S. 499, 510, the Court saying that 'damage alone gives courts no power to require compensation.' We have recognized the rule in this circuit by our holding in Harris v. United States, 10 Cir., 205 F.2d 765, 767, that under the federal constitution 'damages to property not taken are compensable only as a consequence of or incidental to an actual taking.'

Because of this rule which denies the recovery of consequential damages in the absence of any taking, many state constitutions provide in substance that private property shall not be taken or damaged for public use without compensation.[6] However, the federal obligation has not been so enlarged either by statute or by constitutional amendment.

In Causby the Supreme Court held that the continuous invasions of the airspace superadjacent to the property of the landowner by military planes taking off and landing at a nearby base was 'in the same category as invasions of the surface' and that the damages were not 'merely consequential' but 'the product of a direct invasion of respondent's domain.'[7] The plaintiffs argue that the actual damage in Causby resulted from noise and vibrations and that if recovery is permitted

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[5] United States v. Dickinson, 331 U.S. 745, 748.

[6] Richards v. Washington Terminal Company, 233 U.S. 546, 554. In 2 Nichols on Eminent Domain (3d ed. 1950) Sec. 6.44, pp. 324-325, there is a list of 25 states whose constitutions so provide. Interestingly every state within the Tenth Circuit, except Kansas, has so provided.

[7] 328 U.S. 265.

for sound and shock waves traveling vertically, it should also be allowed for such waves traveling laterally. The unacceptability of this theory was demonstrated in Nunnally v. United States, 4 Cir., 239 F.2d 521, where recovery was denied because of diminution in value of a recreational cottage by practice bombing on an adjoining federal proving ground. The Fourth Circuit pointed out that there was no physical invasion of the plaintiff's property and that there was at the most a 'sharing in the common burden of incidental damages' because the annoyance was the same as that to which everyone living in the vicinity was subject in varying degrees. The court said that to permit recovery would be to obliterate the carefully preserved distinction between 'damage' and 'taking.'

We are cited to no decisions holding that the United States is liable for noise, vibration, or smoke without a physical invasion. In Causby, Griggs, and a number of lower court decisions such as Highland Park, Inc., v. United States, Ct.Cl., 161 F.Supp. 597, Herring v. United States, Ct.Cl., 162 F.Supp. 769, and Matson v. United States, Ct.Cl., 171 F.Supp. 283, there were regular flights over the property. Absent such physical invasion recovery has been uniformly denied.[8]

Plaintiffs cite no cases with either facts or issues analogous to those with which we are concerned. Richards v. Washington Terminal Company, supra, allowed recovery because smoke and fumes were driven out of a tunnel by an exhaust fan in such manner that they were directed across plaintiff's property, but in so doing expressly recognized the invasion principle. United States v. Cress, 243 U.S. 316, and United States v. Kansas City Life Insurance Co., 339 U.S. 799, cases of flooding and underflooding respectively, applied the same principle. Swetland v. Curtiss Airports Corporation, 6 Cir.,

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[8] See Freeman v. United States, D.C.W.D.Okl., 167 F.Supp. 541, wherein the flights were alongside the plaintiffs land. In Pope v. United States, D.C.N.D.Tex., 173 F.Supp. 36, the complaint was based on the operation of an engine test cell by the Air Force and it was held that there was no taking because the test cell did not encroach on the plaintiff's land. Nuclear detonations by the Atomic Energy Commission at a site removed from the plaintiff's property was held not to be a taking in Bartholomae Corporation v. United States, 9 Cir., 253, F.2d 716, 718, note 2.

55 F.2d 201, was an action to enjoin a private nuisance and the decision rests on the theory of balance of conveniences.

In Armstrong v. United States, 364 U.S. 40, 48, the Court held that the total destruction of a lien was a compensable taking. Baltimore & Potomac Railroad Company v. Fifth Baptist Church, 108 U.S. 317, 332, sustained a recovery by a church for a nuisance created by a railroad operating in the District of Columbia under congressional authorization and the Court expressed doubt that such authorization would justify total deprivation of use without compensation. In discussing the meaning of the word "taken," the Court said in United States v. General Motors Corp., 323 U.S. 373, 378, that governmental action short of occupancy was a taking "if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter."[9]

In the instant case there is no total destruction and no deprivation of "all or most" of the plaintiffs' interest. The plaintiffs do not suggest that any home has been made uninhabitable or that any plaintiff has moved because of the activities at the Base. The record shows nothing more than an interference with use and enjoyment.

Congress has placed the navigable airspace in the public domain and has authorized administrative regulation of minimum altitudes of flight.[10] The regulations so far as pertinent fix the minimum altitudes at 1,000 feet over congested areas and 500 over sparsely populated areas.[11] The airspace below such minimums is within the dominion of the landowner. The over-flights considered in Causby invaded that dominion. In the situation confronting us the warm-ups occur 2,000 feet, the take-offs 2,280 feet, and the maintenance 1½ miles from the nearest property of the plaintiffs. Causby contains nothing indicating that recovery could be had for noise, vibration, or smoke coming from the same vertical distances.

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[9] Cf. United States v. Dickinson, supra, where the Court said: 'Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time.'

[10] 49 U.S.C. Secs. 1301 (24) and 1348 (a).

[11] 14 C.F.R. Sec. 60.17.

Each of these disturbing conditions is brought to the plaintiffs' properties through the air and they do not effect an actual displacement of a landowner from space within which he is entitled to exercise dominion consistent with recognized concepts of real property rights. Such displacement is a fact when occasioned by repeated airplane flights. Sound waves, shock waves, and smoke pervade property neighboring that on which they have their source but the disturbance caused thereby is only a neighborhood inconvenience unless they are intentionally directed to some particular property as was the case in Richards v. Washington Terminal Co., supra, or unless they force the abdication of the use of space within the landowner's dominion. The activities of which the plaintiffs complain are not directed against them or their property and do not arrogate to the government any of the plaintiffs' dominion over their properties. The situation is common to that found on all the private property surrounding the Base.

The vibrations which cause the windows and dishes to rattle, the smoke which blows into the homes during the summer months when the wind is from the east, and the noise which *interrupts ordinary home activities* do interfere with the use and enjoyment by the plaintiffs of their properties. Such interference is not a taking. The damages are no more than a consequence of the operations of the Base and as said in United States v. Willow River Power Co., supra, they 'may be compensated by legislative authority, not by force of the Constitution alone.' As we see the case at bar, the distinctions which the Supreme Court has consistently made between 'damages' and 'taking' control and compel denial of recovery.

Affirmed.

MURRAH, *Chief Judge*, dissenting.

'It is agreed that subsequent to the establishment of the homes of these plaintiffs, the Government constructed these runways and warm-up pads nearby, for Jet Engine operation, and that, as a direct result of this operation, the 'plaintiffs have suffered a substantial interference of the use and enjoyment of their properties * * *,' with consequent substantial

diminution of the values of such propetties. It seems also agreed that the right asserted, i.e., the peaceful enjoyment of their homes, is a constitutionally protected property right, and that the admitted injury to such right is peculiar to these plaintiffs, who are similarly situated. In any event, 'the constitutional provision is addressed to every sort of interest the citizen may possess,' (see United States v. General Motors, 323 U.S. 373) and certainly includes the right to the peaceful possession of residential property. The economic interest asserted here, is no different from that 'taken' in Causby and Griggs.

Both the trial Court and this Court have denied compensation, upon the premise that an actual physical invasion of the property damaged is a sine qua non to a constitutional taking, and the injury is, therefore, merely consequential; hence, not constitutionally compensable. It is my thesis that a constitutional taking does not necessarily depend on whether the Government physically invaded the property damaged.

It is true that, in the very nature of things, most constitutional takings are accompanied by actual physical invasion. See Transportation Company v. Chicago, 99 U.S. 635; Pennsylvania Coal Co. v. Mahon, 260 U.S. 393; Portsmouth Harbor Land & Hotel Company, et al v. United States, 260 U.S. 327; United States v. General Motors, supra; United States v. Causby, 328 U.S. 256; United States v. Dickinson, 331 U.S. 745; United States v. Kansas City Insurance Co., 339 U.S. 799; Griggs v. Allegheny County, 369 U.S. 84; and, Nunnally v. United States, 235 F.2d 521. But, the Government may surely accomplish by indirect interference, the equivalent of an outright physical invasion. 'If the regulation (interference) goes too far, it will be recognized as a taking.' Pennsylvania Coal Co. v. Mahon, supra, p. 415. Thus, a 'taking' was effected in Armstrong v. United States, 364 U.S. 40, by the destruction of the liens on property through governmental acquisition of title. The closing of a gold mine, by force of a wartime governmental regulation, without physical invasion was held not to be a constitutional taking in United States v. Central Eureka Mining Co., 357 U.S. 155, but not without recognizing that 'action in the form of regulation can so diminish the value of property as to constitute a "taking".' There was force-

ful argument in dissent to the effect that to make the property owner's right to compensation turn on the physical act of taking, was to 'permit technicalities of form to dictate consequences of substance.' (See Mr. Justice Harlan's dissent, p. 181.) It is admitted that the compensable damage in Richards v. Washington Terminal, 233 U.S. 546, was not accompanied by an actual invasion, though the case is said to have been decided on the invasion theory. The facts and reasoning there are analogous to our situation, and serve to prove the recognition of a constitutional taking by indirect interference.

As I view the precedents, especially in the context of their contrariety, the decisional process involves an analysis and evaluation of competing interests, i.e., the public versus private, within the framework of our social order — a jurisprudence of interest, if you please, in which the State imposes its will, subject only to the constitutional covenant that it will pay 'just compensation' for 'private property' which is 'taken.' The critical and definitive words are, to be sure, constitutional language which, as we know, are subject to formulations, depending upon a point of view. We start with the agreed proposition that not every governmental interference, which adversely affects a private economic interest, amounts to a constitutional taking. See United States v. Willow River Power Co., 324 U.S. 499; Armstrong v. United States, supra; and, Nunnally v. United States, supra. 'Frustration and appropriation are essentially different things.' Omnia Company v. United States, 261 U.S. 502.' As I reason, the constitutional test in each case is first, whether the asserted interest is one which the law will protect; if so, whether the interference is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to cause us to conclude that fairness and justice, as between the State and the citizen, requires the burden imposed to be born by the public and not by the individual alone.

Indeed, my brothers impliedly embrace this theory when they indicate that if the governmental interference in this case had rendered the plaintiffs' home totally uninhabitable, the damages would have been compensable, as for a constitutional taking. But, they then say, that since there is 'nothing more than an interference with use and enjoyment' of the

property, the admitted damages are merely 'consequential.' This leaves me in doubt as to whether compensation is denied because the interest asserted is not one which the law will protect, as in United States v. Willow River Power Co., supra, or whether the interference with a protectable property right was not sufficiently direct, peculiar and grave to justify a conclusion of 'taking.' If the decision is based on the latter premise, I must inquire at what point the interference rises to the dignity of a 'taking?' Is it when the window glass rattles, or when it falls out: when the smoke suffocates the inhabitants, or merely makes them cough; when the noise makes family conversation difficult, or when it stifles it entirely? In other words, does the 'taking' occur when the property interest is totally destroyed, or when it is substantially diminished?

My point of view leads me to conclude, contrary to my brothers, that the interference shown here was sufficiently substantial, direct and peculiar to impose a servitude on the plaintiffs' homes, quite as effectively as the over-flights in Causby and Griggs, and the smoke and gases in Richards. I would, therefore, hold the damages constitutionally compensable."

Judgments and Orders

Judgment of the District Court for the District of Kansas:

"Journal Entry of Judgment.

Based upon the findings of fact and conclusions of law heretofore entered in the above entitled case.

IT IS, BY THE COURT, CONSIDERED, ORDERED AND ADJUDGED that plaintiffs take nothing and that judgment be, and it is, hereby entered in favor of the defendant, the United States of America, and for its costs.

Dated at Topeka, Kansas, this 24th day of October, 1961.

/s/ WALTER A. HUXMAN
Judge Assigned.

Filed Oct. 25, 1961."

Judgment of the Court of Appeals, Tenth Circuit:

"Judgment

Second Day, July Term, Tuesday, July 10th, 1962

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable David T. Lewis and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed."

Order of the Court of Appeals, Tenth Circuit:

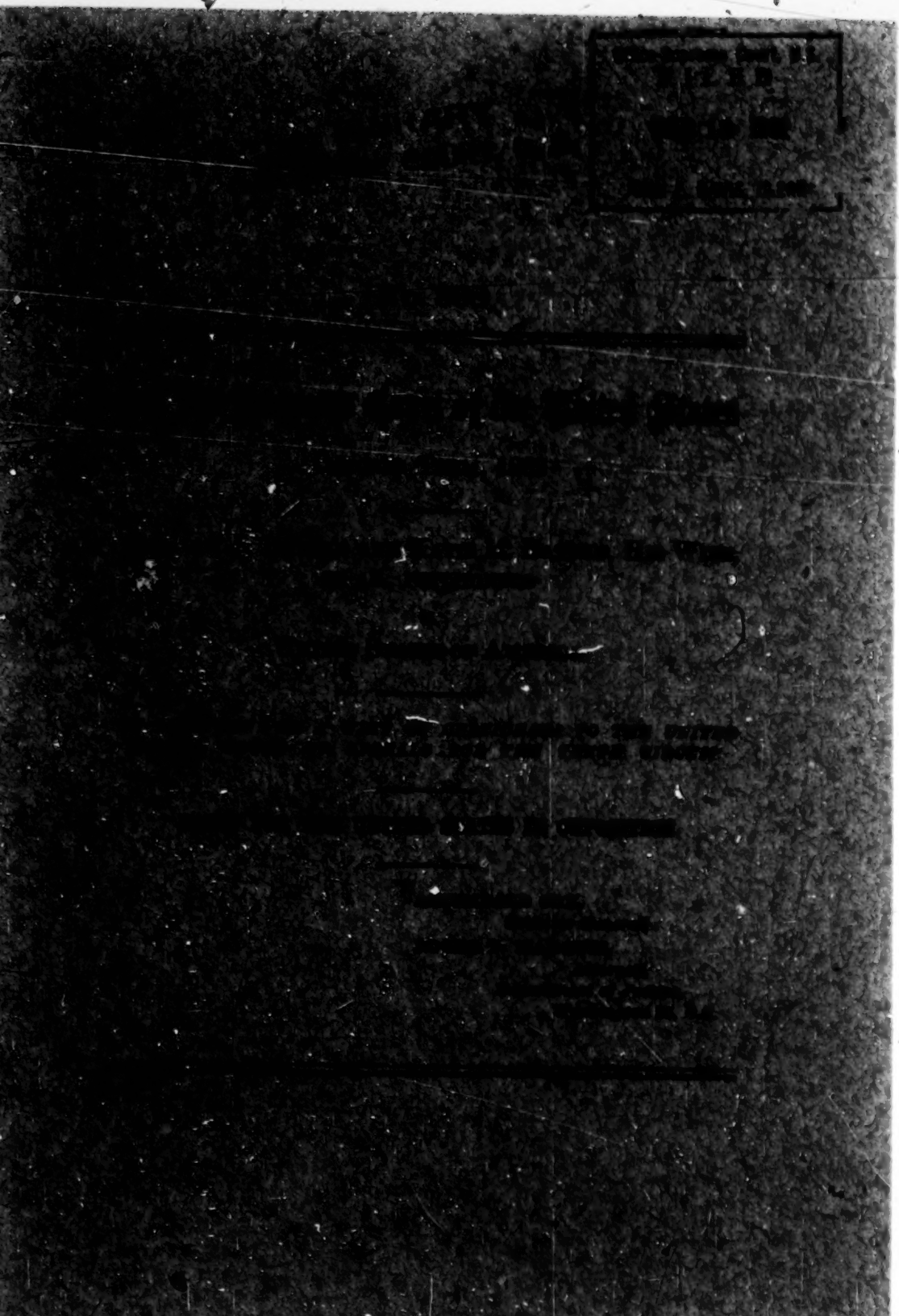
"Order Denying Petition for Rehearing

Twenty-First Day, July Term, Thursday, August 9, 1962

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable David T. Lewis and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the petition of appellants for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied, Honorable Alfred P. Murrah, Chief Judge, dissenting."



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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 568

WILLIAM J. BATTEN AND KATIE M. BATTEN, HIS WIFE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 27–37) are reported at 306 F. 2d 580. Its opinion at an earlier phase of the case (Pet. App. 19–20) is reported at 292 F. 2d 144. The district court's original opinion (Pet. App. 16–18) and its opinion on remand (App., *infra*, pp. 9–10)[1] are not reported.

[1] While petitioners print the findings of fact and conclusions of law after remand (Pet. App. 21–26), they omit the opinion filed therewith.

JURISDICTION

The judgment of the court of appeals was entered July 10, 1962 (Pet. App. 38). A timely petition for rehearing was denied on August 9, 1962 (Pet. App. 38–39), and the petition for certiorari was filed on November 1, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether noise and vibration caused by the authorized use of a United States Air Force Base for national defense purposes constituted a taking of property under the Fifth Amendment, and thus gave rise to a claim for just compensation, where the activities complained of took place from 2,000 feet to one and one-half miles from complainants' nearest property, and where there was no physical invasion of that property.

STATEMENT

In July 1959, the owners of 14 properties located in the vicinity of Forbes Air Force Base near Topeka, Kansas, brought suit under the Tucker Act seeking recovery of stated amounts, each less than $10,000. The case was tried before Senior Circuit Judge Huxman, who, after hearing the evidence, dismissed the case on the basis of the allegations of the complaint. On appeal, the United States moved for remand to determine the actual facts. The remand was ordered and the following facts found:

Forbes Air Force Base (originally known as Topeka Army Air Field), a temporary World War II training field, was deactivated after the war. In 1948,

a residential subdivision in which plaintiffs now reside was laid out north of the base, and houses were built mostly in 1949 and 1950, and none after September 1955. This settlement, known as Pauline, Kansas, is bounded on the west by a heavily traveled four-lane highway, immediately west of which is the main line of the Atchison, Topeka and Santa Fe Railroad (Pet. App. 21).

After the Korean War, the United States acquired a tract north of the base, and adjoining the Pauline addition on its eastern boundary, with a view to enlarging it to accommodate jet aircraft. A runway for that purpose was put into operation in September 1955, and a ramp and warm-up pad constructed. The parking ramp is closest to Pauline, with the warm-up pad and runway to the east of the ramp (Pet. App. 21–22). The western edge of the ramp and parking area is approximately 650 feet from the nearest of plaintiffs' homes on Lake Drive, the ramp itself being 900 feet wide (Pet. App. 22). In 1956, maintenance activity was conducted on the ramp 3,420 feet from plaintiffs' property. Since May 1960, this operation has been removed to a place approximately one and one-half miles from plaintiffs' property (Pet. App. 24).

Since September 1955, about 100 RB–47 and B–47 six-engine jet aircraft have been located at the base. Typically, the planes warm up at a point 2,000 feet, and take off from a point 2,280 feet, from plaintiffs' nearest property (Pet. App. 22). In general, the government neither claims nor exercises any right to fly planes over petitioners' property, since Pauline

lies outside the flight pattern of all aircraft operating from the base (though on a few occasions planes did fly directly over plaintiffs' homes at low altitude) (Pet. App. 23). The flights do, however, cause noises and vibrations on petitioners' properties, rattling windows and dishes, drowning out conversations and television, and interrupting sleep (Pet. App. 24). In addition, the use of an injection system for take-offs during the summer months occasionally causes smoke to be blown across the properties, leaving an oily black deposit on houses, windows, and laundry (Pet. App. 25). The sounds emitted by the jet operations are heard generally throughout the area surrounding the base, not merely on plaintiffs' property, and the effect of the sound waves and smoke upon the Pauline Subdivision is of the same character as that experienced in varying degrees in the general vicinity of the base. However, because of the proximity of plaintiffs' property to the operations, the effects are much greater upon them than upon other property farther removed (Pet. App. 25). The court made specific findings as to the depreciation in value of each property, the amount in most instances being about 50 percent (Pet. App. 26).[2]

[2] The United States was unable to appeal from the findings as to damage since judgment was entered in its favor. It is our view, however, that undue emphasis was given to the alleged undesirability of the property as a residence for some of petitioners and insufficient attention paid to the objective market value test. Evidential rulings precluded proof of the fact that proximity to jet airports enhances, rather than decreases, the value of property for nonresidential purposes, and may have very little depressing effect even upon residential values, as property owners gradually become more accustomed to the new sounds.

In its original opinion, the district court had concluded that under *United States* v. *Causby*, 328 U.S. 256, there must be an intrusion into the airspace over a plaintiff's property in order to constitute a taking. It reaffirmed this view upon remand, stating that the "case of *Richards* v. *Washington Terminal Company*, 233 U.S. 546, is very much in point upon the facts" (App., *infra*, p. 9).

In affirmance, the court of appeals emphasized the distinction under the Federal Constitution (in contrast to the constitutions or statutes of 25 states) between a taking and consequential damages (Pet. App. 30–31), and concluded there was no taking absent an invasion of property. It also noted that the various activities took place 2,000 feet to 1½ miles from the nearest property of the plaintiffs and that *Causby* contained nothing indicating recovery could be had for noise, vibration, or smoke coming from distances of this magnitude (Pet. App. 33). Finally, it found that the activities to which petitioners objected were not specifically directed against them or their property, did not arrogate to the government any of petitioners' dominion over their property, and presented a situation common to all private property surrounding the base (Pet. App. 34).

ARGUMENT

1. We agree that the jet airplane, along with other noisy engines such as rockets, large tractor-trailers, *etc.*, have become a source of considerable annoyance. But the application of constitutional principles in this field is, we believe, clear. The basic rule is that "damage alone gives courts no power to require com-

pensation," *United States* v. *Willow River Co.*, 324 U.S. 499, 510, and that damages "which are the incidental result of lawful governmental action, without any direct invasion of private property, are consequential; they do not constitute a taking under the Fifth Amendment." *Nunnally* v. *United States*, 239 F. 2d 521, 524 (C.A. 4). The fact that the disturbing influence in this case is jet aircraft on government property, rather than practice bombs or the host of other situations involving federal activities which may annoy neighboring property owners, is no ground for allowing recovery.[3] If the result were otherwise, the sole prerequisite to recovery would be substantial damage, and the fundamental constitutional distinction between taking and damage would be obliterated.

2. *Richards* v. *Washington Terminal Co.*, 233 U.S. 546, is not in conflict with the decision below, as petitioners suggest, but strongly supports it, as the district court recognized (Appendix, *infra*, pp. 9–10). There, plaintiff was denied recovery for annoyances (noises, vibrations, emission of smoke and sparks from locomotives) incidental to the normal operation of a railroad near plaintiff's property, and experienced generally by property owners in the vicinity. Recovery was permitted only for those damages caused

---

[3] The lower federal courts which have passed on the question are unanimous in rejecting claims based on noise and vibration where there were no overflights. *Moore* v. *United States*, 185 F. Supp. 399 (N.D. Tex.); *Pope* v. *United States*, 173 F. Supp. 36 (N.D. Tex.); *Freeman* v. *United States*, 167 F. Supp. 541 (W.D. Okla.); *United States* v. *26.07 Acres of Land*, 126 F. Supp. 374 (E.D. N.Y.).

by smoke and gases directed specifically at plaintiff's property by an exhaust fan installed in the railroad tunnel. Nothing comparable occurs here. Both courts below found that the disturbing flight activities created a condition common to all properties surrounding the airfield, and were not specifically directed at petitioners.

United States v. *Causby*, 328 U.S. 256, upon which the district court relied, is entirely consistent with the decision below. There, this Court held that damages resulting from continuous low-altitude flights in the airspace immediately above the landowner's property were not "merely consequential," but were "the product of a direct invasion of respondents' domain", and reiterated the rule that "it is the character of the invasion, not the amount of damage resulting from it * * * that determines the question whether it is a taking" (328 U.S. at 265, 266). The Court of Claims has subsequently held that flights above the 500-foot level would not be actionable under *Causby*. *Matson* v. *United States*, 171 F. Supp. 283 (per Mr. Justice Reed). And if vertical shock waves travelling more than 500 feet do not give rise to a direct invasion, it can scarcely be urged that horizontal waves emanating from a source 2,000 feet to 1½ miles from petitioners' property would do so.

CONCLUSION

Since the decision below is plainly correct and is not in conflict with any other decision, the petition for certiorari should be denied.

Respectfully submitted.

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Solicitor General.
ROGER P. MARQUIS,
Attorney.

DECEMBER 1962.

APPENDIX

Opinion of District Court on Remand

The court adopts as a part of its opinion, the opinion it filed at the time it sustained the Government's motion to dismiss the complaint for failure to state a cause of action. Not much need be said in addition to what was said in that opinion. The conclusion is inescapable to the court that the philosophy of *United States* v. *Causby*, 328 U.S. 256, is that before there is a taking by the Government, there must be some form of entry upon the property of a complainant. Noises and sound vibrations originating outside the boundaries of plaintiffs' property and transmitted across the property do not constitute a taking. The holding of the court in the *Causby* case is summed up in syllabus (d), as follows:

> Flights of aircraft over private land which are so low and frequent as to be a direct and immediate interference with the enjoyment and use of the land are as much an appropriation of the use of the land as a more conventional entry upon it.

While there was an occasional flight over plaintiffs' property in this case, it was accidental and not as a result of a claimed right. Plaintiffs do not rely for recovery upon such occasional flights. They rely entirely upon the sound waves and smoke originating outside the confines of their property.

The case of *Richards* v. *Washington Terminal Company*, 233 U.S., 546, is very much in point upon the facts. There, property owners whose land adjoined a railroad line were denied recovery for damages

resulting from the noise, vibrations, smoke and the like, incidental to the operation of the railroad. Recovery there, as here, was sought on the ground that these things constituted a taking under the power of eminent domain enjoyed by the railroad company. In the *Causby* case, the Supreme Court referred to and apparently approved the *Richards* case by distinguishing it from the *Causby* case.

It is conceded that no recovery can be had because of the tort or nuisance, and that recovery must be had on the sole theory that the acts complained of constituted a taking of an interest in plaintiffs' property for which compensation must be paid.

The court is unable to find there was such a taking.

/s/ WALTER A. HUXMAN,
Judge, Assigned.

Filed Oct. 23, 1961.

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IN THE

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OCTOBER TERM, 1962

No. 568.

WILLIAM J. BATTEN AND KATIE M. BATTEN
HIS WIFE ET AL.,
Petitioners

vs.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

A. HARRY CRANE
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SUPREME COURT OF THE UNITED STATES

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REPLY BRIEF OF PETITIONERS

QUESTION PRESENTED

Petitioners believe that the question presented as set forth in the Brief of the United States in Opposition is incorrect, and that the true question presented is that set out in the Petition for Certiorari at p. 3, to-wit:

> "Whether the action of the United States in directing against and across private residential property, loud

and continuous noises and strong vibrations, accompanied by smoke, soot and unpleasant odors, so as to place upon such private properties a direct, permanent and substantial burden not substantially shared by the general public, consititutes a taking of property within the meaning of the Fifth Amendment to the Constitution of the United States."

STATEMENT

The statement contained in the Brief of the United States in Opposition conveys the impression that all activities complained of take place 2,000 feet or more from petitioners' properties (Br. p. 3, p. 5). This is incorrect. The edge of the aircraft ramp and parking area is 650 feet from plaintiffs' closest homes and is 900 feet wide (Pet. App. p. 22). Aircraft engines are started *on this ramp* 30 minutes prior to take off time and are taxied to the warm up pad approximately 20 minutes prior to take off time. (Pet. App. p 22). Auxiliary ground power units are frequently operating from 8 to 10 hours at a time *on the aircraft parking ramp*, and there are commonly from four to ten of these units operating at once (Pet. App. p. 84).

ARGUMENT

The United States seeks by its argument to find support in the case of *Richards* v. *Washington Terminal Co.*, (1914) 233 U.S. 546, 34 S. Ct. 654, 58 L. Ed. 1088, by taking the position that in *Richards* the recovery was allowed only for such smoke and gases as were specifically directed at the injured landowners property, and that nothing comparable occurs in the instant case. The case does not support the argument, for the court in *Richards* pointed out that Richards was a neighboring, *though not adjacent*, land-

owner. It is patently obvious that there had to be one or more intervening landowners and therefore the smoke and gases from the offending tunnel exhaust system could *not* have been specifically directed at Richards. The fact is that the court in *Richards* followed the earlier decision of *Baltimore and Potomac Railroad Company* v. *Fifth Baptist Church*, (1883) 108 U.S. 317, 2 S. Ct. 719, 27 L. Ed. 739, wherein recovery was granted for the noise, vibration, smoke and soot arising from an engine house. Clearly, nothing was said in that case about any of these injurious elements being specifically directed at the Church. There, as in the *Richards* case and in the case now before the court, the critical factor was that the offending activity had been so localized and concentrated in one area as to place on the neighboring landowner a burden much greater than that shared commonly by the public as a whole.

Respondent interjects the case of *United States* v. *Causby*, (1946) 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206, as being consistent with the decision of the lower court. *Causby* was a different case entirely. It determined liability for the taking of an avigation easement over private land, and was not at all concerned with a factual situation such as raised herein. It is important to note, however, that this court in *Causby* did not simply hold, as the United States and the courts below have insisted, that the mere flying of planes through the column of air directly above certain land constituted a taking. The court in fact held at p. 266 of the official report:

> "Flights over private land are not a taking, unless they are so low and so frequent as would be a *direct and immediate interference with the enjoyment and use of that land.*" (Emphasis supplied).

The decision was thus predicated on the impact upon the *use and enjoyment* of the land, rather than the relative posi-

tion of the aircraft, a rationale pointed out by Mr. Justice Black when he said in dissent at p. 269:

> "Consequently it appears to be noise and glare, to the extent and under the circumstances shown here, which make the government a seizer of private property."

Respondent cites *Matson* v. *United States*, (Ct. Cl. 1959) 171 F. Supp. 283, for authority that under *Causby* shock waves traveling more than 500 feet cannot consummate a a taking. *Causby* did not so hold. The 500 foot level above the landowners property in *Causby* was the lower reach of the public navigable airspace. Since the flights there were below that level, this court specifically *declined* to rule on the situation that would be presented if flights above that level had the same effect. In any event, it would seem totally inconsistent with any concept of justice to suggest that private citizens may be subjected to identical burdens, and yet receive totally opposite treatment at the hands of the courts because of an intervening line measuring an arbitrarily determined number of feet. If this should be held the rule, it would be truly a landmark decision, for never before has justice been measured in feet and inches.

2. Respondent argues that this court has laid down a clear rule that a direct invasion of private property is essential to a taking, and that this can only be accomplished by the projection of some instrumentality on or over the land. Assuming, *arguendo*, that the "direct invasion" test is the sole test of a taking, it is patent that this court has *never* held that such an invasion can be effected only by penetration by some object or instrumentality. Such an interpretation is inconsistent with the fact that this court spoke in terms of an invasion of private property when discussing the smoke and gases in *Richards*, and treated of the noise and vibration in *Baptist Church* in terms of a taking of private property without ever mentioning the term "inva-

sion". It is worthy of note that a taking may be accomplished by regulation, as noted in *Pennsylvania Coal Company* v. *Mahon*, (1922) 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322, and *United States* v. *Central Eureka Mining Co.*, (1958) 357 U.S. 155, 78 S. Ct. 1097, 2 L. Ed. 2d 1228. It would appear that the only way in which the many decisions involving a "taking" may be rationalized is by recognizing that historically when this court has referred to an "invasion", it spoke in terms of *rights* rather than tangible, visible property. Hence the test which may be universally applied to all cases in determniing whether a taking has occurred is not the "invasion" test, but rather the test which only requires a determination whether the burden is borne by the public as a whole, or has been unfairly shifted to the shoulders of the few. The rationale of such a test was reiterated recently by Mr. Justice Black in *Griggs* v. *Allegheny County*, (1962) 369 U.S. 84, 82 S. Ct. 531, 7 L. Ed. 2d 585, where he said (Dissenting on grounds inapplicable here) at p. 94, "* * * it would be unfair to require petitioner and others who suffer serious and peculiar injuries by reason of these transportation flights to bear an unfair proportion of the burdens of air commerce * * *" Petitioners submit that their situation, with the continuing subjection to sound pressure levels in excess of those levels at which the United States requires ear plugs for its personnel, sleepless nights, and myriad other factors found by the District Court, qualifies them for inclusion among the "others who suffer serious and peculiar injuries".

3. Since the filing of the Petition for Certiorari herein, the Supreme Court of Oregon has rendered its decision in *Thornburg* v. *Port of Portland*, (1962) 75 Adv. Sh. 375, Ore. , 376 P.2d 100. The question before that court was very like the question here, in that it was necessary to determine whether a taking of private property

could occur as a result of noise and vibrations from aircraft on or above *neighboring* land. The Oregon Court held that such a taking could occur, and in the course of its opinion commented at length on the decision below in this case, saying at p. 382:

> "In view of the importance of the question presented in the *Batten* case, and in view of the strong dissent by the chief judge, it would be premature to speculate now upon the final direction the federal courts will take. We believe the dissenting view in the *Batten* case presents the better-reasoned analysis of the legal principles involved, and that if the majority view in the *Batten* case can be defended it must be defended frankly upon the ground that considerations of public policy justify the result: i. e., that private rights must yield to public convenience in this class of cases. The rationale of the case is circular. The majority said in effect that there is no taking because the damages are consequential, and the damages are consequential because there is no taking."

The Oregon Court, with regard to the "taking vs. damage" argument, offered here by Respondent in its brief at p. 6, recognized this distinction but said at p. 389:

> "As noted above, this court has expressed a policy against allowing compensation in several situations where there was no actual physical injury to the real property. The cases used terms such as 'these are only consequential damages', or 'there was damage here but not sufficient to be a taking', or 'these are damages *damnum absque injuria*.' Such expressions describe conclusions that the court reached when it had decided that the facts involved did not measure up to the standard necessary for a 'taking'. Such injuries were then held to be noncompensable as a matter of law, under the policy against allowing compensation for mere 'damages'. Such decisions, which were no doubt right in cases of single-instance wrongs, prove too much when applied to continuing and substantial interference

with the use and enjoyment of property. Ordinarily, in a case of continuing interference, whether it is substantial enough to constitute a taking will be for the jury to determine."

Thus the Supreme Court of Oregon has taken a position diametrically opposed to the position of the court below herein. This decision, coupled with the sharp dissent of Chief Judge Murrah below, points clearly to the importance of the legal principle now laid before this court, and to the marked divergence of opinion on the law among eminent jurists today.

CONCLUSION

Petitioners submit that the importance of the question presented, the divergence of views below, and the conflict with prior decisions of this court demonstrate that the deciison below should be reviewed by this court, and respectfully pray that their petition for certiorari be granted.

Respectfully submitted,

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PETITION FOR REHEARING.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITION FOR REHEARING.

Petitioners pray that petition for rehearing be granted, and that the court reconsider its order of January 7, 1963, denying the petition for certiorari herein.

ARGUMENT.

Petitioners respectfully submit that the court should reconsider its order of January 7, 1963, denying the petition for certiorari herein, and grant a rehearing thereon.

1. If this case is allowed to stand in its present position, it will present a situation charged with potential conflict, both among the federal courts and within the state and district of Oregon, and no doubt will become a breeding ground for litigation for some time to come. It is true that there is today no direct conflict in decisions by Courts of Appeals of different Circuits on the subject matter of the case now before the court. Yet there is every indication that the seeds of such conflict have been sown, and will without question present difficulty to lower courts for some time to come, unless this court now acts to clarify the Federal position.

There are currently four recent cases which have direct bearing on the dilemma of any lower court now considering a case of this nature. The first of these is *Highland Park* v. *United States*, (Ct. Cl. 1958) 161 F. Supp. 597, where the Court of Claims held that even though government aircraft had been flying at low altitude over plaintiff's property for many years, the Statute of Limitations on plaintiff's claim did not start running until the noise and disturbance caused by these aircraft created a substantial interference with plaintiff's property. Thus, the decision there indicates that the mere presence of aircraft in the column of air above private land does not constitute a taking of property, but rather that such a taking is only accomplished by the interference caused at the surface.

This position of the Court of Claims was made amply clear when the court said in *Jensen* v. *United States,* (Ct. Cl. 1962) 305 F.2d 444:

> "Unless there has been a significant depreciation in value or enjoyment of a property, this court has not considered the mere advent of jet aircraft as the signal of a taking."

Next was decided *United States* v. *15,909 Acres,* (D.C.S.D. Cal., 1958) 176 F. Supp. 447, proceeding in eminent domain. There the United States took avigation easements over certain properties, but other landowners sought to be included, although the government sought no easement over their properties. As to these other landowners, the United States District Court said:

> "When the jet planes began to fly over and *in the neighborhood of* the plaintiff's property the value of the property was affected * * * the government appropriated a flight easement in airspace over the land." (Emphasis supplied).

Thus, a Federal District Court in the 9th Circuit renders a decision making no distinction whether aircraft are *over* or *in the* neighborhood of the injured property, where the effect is the same. The decision easily squares with the prior *Highland Park* decision, making the critical element the injury done, rather than the location of the offending aircraft.

Following these cases came the decision by the court below in the instant case, directly holding that the critical element to recovery is the presence of aircraft in the column of air directly over private land, and that the absence of that element is fatal, no matter how great the injury done. This decision clearly varies from the prior decisions in that *for the first time* the fact that rights to use

and enjoy property are seriously impaired or destroyed is completely ignored.

The last case in the chain is the recent decision by the Oregon Supreme Court in *Thornburg* v. *Port of Portland*, 75 Adv. Sh. 375, ... Ore. ....., 376 P.2d 100, where, under a state constitutional provision identical to that of the United States Constitution, that court took a position directly opposed to that of the court below herein, and squarely held that a taking of private property was accomplished by a substantial impairment of the right to use and enjoy property caused by aircraft noise, whether the offending aircraft are above the land in question or not. The decision clearly squares with the prior federal decisions in *Highland Park* v. *United States*, *supra*, and *United States* v. *15,909 Acres*, *supra*, turning the decision on the reality of whether or not property rights have been lost, rather than on the technical distinction as to the location of the source of difficulty adopted by the court below.

Thus the decision below stands as a clear departure from the running current of thought in the recent cases. The difficult question which would now be presented a Federal Court sitting in Oregon is clear. Oregon is in the 9th Circuit. Shall such a court rule that substantial interference with rights to use and enjoy private property by operation of jet aircraft *in the neighborhood of* plaintiffs constitutes a taking, as indicated by another District Court of his own Circuit, and as clearly held by the highest court of the state in which he sits, or shall he ignore those decisions and follow the decision of the court below herein, as a decision of a higher Federal Court, but from a different circuit?

A further difficulty appears. How shall a court now decide where aircraft fly over a subdivision of closely

packed homes, passing over some, but not all? Shall one citizen have a claim, and his next door neighbor be denied?

2. The foregoing argument in favor of granting the petition for certiorari herein could not be fully developed in the petition for certiorari filed herein for the reason that the petition was filed prior to the decision by The Oregon Court. When considered with the reasons already advanced by petitioners in support of the petition for certiorari, petitioners believe that this case should clearly appear as one of paramount importance. The recent decisions show at every turn the variance of views among learned judges. The alacrity with which the highest court of a state acted to reject the reasoning of the court below points up the true divergence of views in no uncertain terms. Because of this divergence, it would seem that litigation on this subject will continue to build until this court finally speaks to settle the federal position. If this occurs, then petitioners will have been denied their opportunity to submit their cause to this court solely because they have come too early to the bar. In the light of all that petitioners have suffered so far, it would be manifest injustice to allow this to occur.

CONCLUSION.

The case at bar turns upon grave questions as to private rights in property. It involves the matter of whether the United States may with impunity destroy rights to use property so long as it sends no agent upon the property. If this decision stands, private rights to hold property in this land are seriously jeopardized. By far the greatest single benefit of living in a free nation is the right of the individual to own, use and enjoy property according to his own wishes, and if this right becomes im-

paired, the civil liberties which we so greatly cherish become but a hollow thing.

For these reasons, petitioners pray that a rehearing be ordered and that their petition for writ of certiorari be granted.

Respectfully submitted.

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CERTIFICATE.

A. Harry Crane, a member of the Bar of the Supreme Court of the United States, hereby certifies that the above and foregoing petition for rehearing is presented in good faith and not for delay, and that the same is based on substantial grounds now available to petitioners and not previously presented; that petitioners did not have an opportunity to fully develop arguments in their petition for a writ of certiorari brought about by authority cited herein, which authority had not been decided until after the filing of the petition for a writ of certiorari.

A. HARRY CRANE.